May Properties Sdn Bhd v Kong Phew Keng

HIGH COURT (SHAH ALAM)—CIVIL APPEAL NO RS11—12 OF 1994
ABDUL WAHAB PATAIL JC
22 NOVEMBER 1995

Landlord and Tenant *— Rent — Non-payment — Notice to quit issued — Termination effective — Whether appellant was entitled to double rental after the determination of tenancy — Whether double rental could only be claimed where month for which it is claimed has expired — Civil Law Act 1956 s 28(4)(a)*

Landlord and Tenant *— Distress — Execution — Whether bailiff allowed to effect distress or to break into premises to effect distress outside of office hours*

Premises owned by the appellant were rented to the respondent ('the tenant') effective from 1 January 1992 until 31 December 1993. Rental was payable in advance. Due to previous breaches, the appellant had issued a two months' notice to quit on 30 September 1992. Thus, termination was effective from 1 December 1992. The appellant contended that since the tenant was holding over from 1 December 1992, the appellant was therefore entitled to claim double rental. The magistrate rejected the appellant's claim for the double rental as the action was filed on 10 December 1992, which was before the month of December had expired. As a consequence, it was said, the appellant could neither claim rental for the month of December nor the double rental. A further question arose as to whether the bailiff could effect distress outside office hours and/or break into the demised premises for the purpose of effecting distrss. The magistrate dismissed the application for the bailiff to effect distress proceedings outside of office hours. The appellant appealed against these decisions.

Held, allowing the appeal:

(1) Under s 28(4)(a) of the Civil Law Act 1956, the landlord has the option to charge the tenant with double the amount of his rent until the premises are returned if the tenant continues possession and detains the premises after the determination of the tenancy whether a notice to that effect has been issued or otherwise. Since the agreement here provided that the rental was payable in advance, therefore, the double rent for the month of December was due and payable at the beginning of the month. Since the rental was not paid when due, under s 5(1) of the Distress Act 1951 ('the Distress Act'), distress proceedings could be taken (see p 40D–G; *Child v Edwards* [1909] 2 KB 753 followed).

(2) There is nothing in the Distress Act specifying when distress could be effected. Looking at the terms of the present ex parte application, it was clear and justified that an authorization to effect distress be given and/or the bailiff be allowed to act during office hours to break into the premises if necessary or to act after office hours, whichever was more practicable (see p 41A–C).

[Bahasa Malaysia summary

Sebuah premis kepunyaan perayu telah disewakan kepada penentang (penyewa itu) dari 1 January 1992 hingga 31 Disember 1993. Sewa dibayar secara pendahuluan. Disebabkan oleh beberapa kemungkiran pada 30 September 1992, perayu telah mengisukan suatu notis dua bulan kepada penentang untuk keluar dari premis tersebut. Oleh yang demikian, pembatalan perjanjian sewa berkesan dari 1 Disember 1992. Perayu menyatakan bahawa ia berhak untuk menuntut bayaran sewa dua kali ganda kerana penentang masih menduduki premis tersebut selepas 1 Disember 1992. Majistret telah menolak tuntutan perayu untuk sewa dua kali ganda kerana tindakan tersebut telah difailkan di mahkamah pada 10 Disember 1992 iaitu sebelum bulan Disember berakhir. Maka, kata majistret bahawa perayu tidak dapat menuntut sewa bagi bulan Disember dan lebih-lebih lagi sewa dua kali ganda tersebut. Satu lagi soalan timbul sama ada bailif boleh melaksanakan tindakan distres diluar waktu pejabat dan/atau memecah masuk ke dalam premis itu untuk tujuan melaksanakan tindakan distres. Majistret menolak permohonan bailif untuk melaksanakan tindakan distres ke atas premis tersebut selepas waktu pejabat. Pihak perayu merayu terhadap keputusan-keputusan itu.

Diputuskan, membenarkan rayuan itu:

(1) Di bawah s 28(4)(a) Akta Undang-Undang Sivil 1956, tuan tanah mempunyai opsyen untuk menuntut sewa dua kali ganda sehingga premis itu dikembalikan jika penyewa masih lagi memegang milik ataupun menahan premis tersebut selepas penamatan penyewaan sama ada notis yang membawa kesan sedemikian telah dikeluarkan atau belum. Oleh kerana perjanjian sewaan di sini menyatakan bahawa sewa premis itu hendaklah dibayar secara pendahuluan, maka bayaran sewa dua kali ganda bagi bulan Disember tersebut haruslah dibayar pada permulaan bulan Disember. Memandangkan bayaran sewa bagi bulan tersebut tidak ditunaikan apabila ianya kena dibayar, di bawah s 5(1) Akta Tahan-harta 1951 ('Akta Tahan-harta itu') tindakan distres boleh dilaksanakan (lihat ms 40D–G; *Child v Edwards* [1909] 2 KB 753 diikut).

(2) Tidak terdapat apa-apa peruntukan dalam Akta Tahan-harta itu yang mengatakan secara spesifik bila distress boleh diambil. Melihat terma dalam permohonan ex parte ini, adalah munasabah jika suatu tindakan distres dibenarkan dan/atau bailif dibenarkan memecah masuk ke dalam premis tersebut semasa waktu pejabat jika keadaan memerlukan ataupun untuk bertindak selepas waktu pejabat, melihat keadaan yang mana lebih praktik (lihat ms 41A–C).]

Notes

For a case on double rent, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1266.

For cases on distress, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 983–995.

Case referred to

Child v Edwards [1909] 2 KB 753

Legislation referred to

Civil Law Act 1956 s 28(4)(a)
Distress Act 1951 s 5(1), (2)

Chan Yat Hee (Chan Yat Hee & Associates) for the appellant.
Kong Phew Keng in person, the respondent.

Abdul Wahab Patail JC: This is an appeal from the decision of the Magistates' Court, Shah Alam made on the 10 December 1992 on the following grounds:

1 Yang Arif majistret telah silap dalam fakta dan/atau dalam undang-undang apabila beliau memutuskan bahawa distress bagi bulan Disember dan sewa dua kali ganda bagi bulan Disember tidak dibenarkan.

2 Yang Arif majistret telah silap dalam fakta dan/atau dalam undang-undang apabila beliau memutuskan bailif tidak dibenarkan memecah masuk ke premis tersebut selepas waktu pejabat dengan tidak mengambilkira bahawa premis tersebut adalah sebuah 'pub' yang menjalankan perniagaan selepas waktu bekerja bailif.

3 Dalam keseluruhan keadaan kes ini dan atas alasan-alasan tersebut Yang Arif majistret tidak patut memutuskan bahawa tuntutan plaintif untuk distress bulan Disember 1992 dan sewa dua kali ganda bagi bulan Disember serta memecah masuk ke premis tersebut selepas waktu pejabat tidak dibenarkan.

The appellant's case is as follows: the appellant had rented the premises to the respondent. The tenancy began on 1 January 1992 and was to expire on 31 December 1993. Rental was payable in advance. Due to previous breaches, two months notice to quit was issued on 30 September 1992. The termination is, therefore, effective from 1 December 1992.

The first issue is whether the appellant was entitled to double rental for the month of December. It is argued by counsel that as the tenant was holding over from 1 December 1992, the plaintiff was entitled to claim double rental. The learned magistrate had ruled because the action was filed on 10 December 1992, before the month had expired, the appellant could not claim rental for the month of December, let alone double rental.

The s 28(4)(a) of the Civil Law Act 1956 ('the CLA') provides:

> Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

Section 5 of the Distress Act 1951 ('the Distress Act') provides:

> (1) A landlord or his agent duly authorized in writing may apply ex parte to a judge or registrar for an order for the issue of a warrant, to be called a warrant of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application and the judge or registrar may make such order accordingly.
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> (2) Arrears of rent may be distrained for after the determination of the tenancy, provided that either the tenant is still in occupation of the premises in respect of which the rent is claimed to be due, or any goods of the tenant are still on the premises.

The CLA provides the basis for claiming double rental at the owner's option. The owner having exercised his option under the Act, the double rental if not paid is rental due or payable. Section 5(1) of the Distress Act allows an application for the issue of a warrant for the recovery '*of rent due or payable to the landlord by a tenant* of any premises for a period not exceeding *twelve completed months* of the tenancy immediately preceding the date of the application.' In this case, since under the agreement the rental is payable monthly in advance, the rent for the month of December was due and payable at the beginning of December. Not having been paid when due and payable, distress proceedings could be taken: see *Woodfall's Landlord And Tenant* (20th Ed) at para 262*; Child v Edwards* [1909] 2 KB 753. While the tenancy had terminated at the end of November, the payment in advance at beginning of December would be applicable since to hold otherwise would be inequitable as it would improve the payment terms of a tenant who ignores a termination of tenancy.

The basis of the claim of double rental is that the tenant continued possession or detained the property after the determination of the tenancy. The option to claim double rental is given to the landlord, exercisable whether he had given notice or not. In this case, the tenancy having expired at the end of November 1992, the appellant was entitled to claim double rental until the property was returned to him.

The second matter is with regard to the distress action. The learned magistrate rejected the application for the bailiff to effect distress outside of office hours. In perusing the application, it is clear that the application was to authorize the bailiff to effect distress outside office hours and/or to break into the demised premises for the purpose of distress.

Hence, the rejection of application for distress outside of office hours did not deal fully with the application. The ground for rejection is that according to the Distress Act and its practice, before authorization is given to effect distress after office hours, ordinary distress must have first failed and based on such failure a separate application for distress outside office hours must be made. The learned magistrate also rejected reference to previous distress during office hours which failed on the grounds that in those instances the parties ultimately settled. Clearly, the terms of the application was not considered.

I have this second ground, so as to grant the terms of para (a)(ii) and (b) of the ex parte application. It would allow the bailiff to act *during office*

A *hours* to break into the premises if necessary or to act *after office hours*, whichever is the more practicable. In practice, however, it is inconvenient, if not difficult, to have personnel to act after office hours; hence, where premises are closed during the day, it may be necessary to break in. There is nothing in the Distress Act, however, specifying when distress could be effected.

B

Appeal is, therefore, allowed in terms of the ex parte application for double rental for the month of December, to effect distress and/or to break into the demised premises for the purpose of distress during or outside office hours.

C *Appeal allowed.*

Reported by Hanim Kamaruddin

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